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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/759,983	01/12/2001	Gabriel Grant Gamache	12929.1009USU1	1033
23552	7590	12/11/2003	EXAMINER	
MERCHANT & GOULD PC P.O. BOX 2903 MINNEAPOLIS, MN 55402-0903			COCKS, JOSIAH C	
			ART UNIT	PAPER NUMBER
			3749	
DATE MAILED: 12/11/2003 21				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.	09/759,983	
Examiner	GAMACHE, GABRIEL GRANT	
Josiah C. Cocks	Art Unit 3749	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 08 October 2003.

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-9 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-9 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. _____.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

13) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

a) The translation of the foreign language provisional application has been received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

1) Notice of References Cited (PTO-892)

2) Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.

4) Interview Summary (PTO-413) Paper No(s) _____.

5) Notice of Informal Patent Application (PTO-152)

6) Other: _____

DETAILED ACTION

Response to Amendment

1. Receipt of applicant's amendment filed 10/8/03 is acknowledged.

Claim Rejections - 35 USC §§ 102 & 103

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-3 and 7-9 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over *Heitland* (US # 605,713).

Heitland discloses in Figures 1-4 a fireplace substantially as described in applicant's claims 1-3 and 7-9 including a combustion chamber formed by a firebox and front wall (see Figs. 1 and 3 and items E and d), the front wall including a door (E) that is pivotally mounted to the front wall about a horizontal axis such that in its closed position the door (E) is parallel to the front wall and in its open position forms a horizontal surface (see Fig. 1). In regard to the

limitation of a shelf in claim 1, it would be inherent that the door (E) in its lowered position would function as a shelf. As shown in Fig. 3 the portion of the front wall (item d) at least partially encloses the combustion chamber. Further, *Heitland* specifically notes on page 2, lines 4-7 that heating box (B) with front door (e) may be built in with the fire-brick or lining of the combustion chamber.

In regard to claims 7 and 8, the examiner regards the limitations of: a portion of the front wall extending from the horizontal axis to an outer end of the shelf in a closed position and remaining to enclose the combustion chamber in an open position, to be met by the frame portions (A2 and A) of *Heitland* which extend from the horizontal axis an outer end of shelf/door (E) in a closed position (see Fig. 2) and remain to enclose the combustion chamber in an open position (see Fig. 1). Further, the examiner considers that the combustion chamber of *Heitland* extends between the portions (A2 and A) and the firebox (unnumbered brick portions, see Figs. 2 and 3).

In regard to claim 9, *Heitland* clearly shows that when door (E) is in an open position (as in Fig. 1), a planar surface is formed by either the surface of the slide (e') or the back surface of the door (E).

5. Claims 4-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Heitland* (US # 605,713) in view of *Wilkening* (US # 4,515,146).

Heitland discloses all the limitations of claims 4-6 except doors pivotally mounted to the firebox or front wall which serve to enclose the combustion chamber and the front wall and firebox form a substantially air tight seal.

Wilkening teaches a fireplace door assembly comprising a front frame portion (10) and doors (15 and 16) pivotally mounted about a vertical axis, wherein the frame may be fastened to or within the opening of a fireplace (see col. 3, lines 57-59). *Wilkening* further teaches the desirability of a gasket (23) to form an effective airtight seal between the doors and the frame (10) (see col. 3, lines 35-57) and the frame and the firebox (see col. 1, lines 30-34 and lines 65-66).

Therefore, in regard to claims 4-6, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to modify the fireplace of *Heitland* to incorporate the frame and pivotal doors and air tight sealing of *Wilkening* for the desirable purpose of providing an easily adjustable means for closing off and effectively air tight sealing the front of the firebox opening.

Response to Arguments

6. Applicant's arguments filed 10/8/03 have been fully considered but they are not persuasive. Applicant contends that door (E) of *Heitland* cannot function as a shelf when the door is in an open position due to the presence of damper slide (e'). However, the examiner notes that the slide (e') operates only when the door (E) is in a closed position (see in Fig. 2) so that heated air may be allowed to pass into the room (see *Heitland*, page 1, lines 100-105). Therefore, the slide would not serve to prevent door (E) from functioning as a shelf as asserted by applicant. Further, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of

performing the intended use, then it meets the claim. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). In this case, the examiner considers the recitation of a shelf in applicant's claims as a statement of intended use. There is no structural difference in the recitation of a shelf distinct from the door (E) of *Heitland* in its open position. As has been noted, in item 4 above, the examiner considers that the door (E) is capable of performing the intended use of serving as a shelf.

Conclusion

7. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

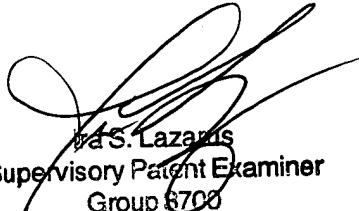
8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Examiner Josiah Cocks whose telephone number is

(703) 305-0450. The examiner can normally be reached on weekdays from 7:30 AM to 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ira Lazarus, can be reached at (703) 308-1935. The fax phone number for the organization where this application or proceeding is assigned is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0861.

jcc *jm*
December 4, 2003



Ira S. Lazarus
Supervisory Patent Examiner
Group 3700